Chong Thian Fook & Ors v Sarawak Shell Berhad & Ors

HIGH COURT (MIRI) — SUIT NO 22-69 OF 2002 (MR)
ABDUL AZIZ JC
13 AUGUST 2004

Contract — Unjust enrichment — Essential ingredients — Benefits in form of tax deductions for contributions to Retirement Benefit Fund — Whether defendants enriched by benefits — Whether benefits gained at plaintiff's expense — Whether unjust to allow defendant to retain benefits

Labour Law — Provident fund — Contributions — Retirement benefit fund set up by employer for benefit of employees — Employer contributed to Employees Provident Fund — Whether employer may deduct amounts made to Employees Provident Fund from retirement benefit fund — Employees Provident Fund Act 1951 s 9(1) — Employees Provident Fund Act 1991 s 47(1)

Trusts and Trustees — Trustees — Breach of trust — Deductions made by trustees pursuant to trust deed — Deductions unlawful — Whether trustees exercised any discretionary power to effect deductions — Whether breach of trust

Words and Phrases — 'Remuneration' — Meaning of — Employees Provident Fund Act 1951 s 9(1) — Employees Provident Fund Act 1991 s 47(1)

The plaintiffs were the former employees of the first and second defendants and were at the material time, members of the Shell Sarawak and Sabah Retirement Benefit Fund ('the RBF') or the Shell Sarawak and Sabah Provident Fund ('the PF'). The RBF and the PF (collectively, 'the Funds') were constituted pursuant to two trust deeds and the regulations made thereunder ('the 1976 Regulations'). The plaintiffs' claim against the defendants was in respect of the plaintiffs' entitlement under the RBF and the PF. The plaintiffs had discovered that deductions had been made from the RBF and the PF for, inter alia, the first and second defendants' contributions to the Employees Provident Fund ('EPF') and the interests and/or dividends that were declared on the aforesaid contributions by EPF. The plaintiffs prayed for, inter alia, declarations that certain regulations in the RBF trust deed contravened s 9(1) of the Employees Provident Fund Act 1951 ('the 1951 Act') and s 47(1) of the Employees Provident Fund Act 1991 ('the 1991 Act') and were accordingly, ultra vires the respective Acts.

The parties applied under O 14A of the Rules of the High Court 1980 to have the following preliminary questions of law determined by the court: (1) whether, upon a construction of the 1976 Regulations, the benefit payable to a member was a sum equal to the 'level of benefit applicable' as mentioned in reg 5(3)(a) thereof or a lump sum which was sufficient to bring the aggregate of the contributions up to the level of benefits specified in reg 5(3)(a); (2) if the answer to (1) was a lump sum, whether such a calculation was in breach of the provisions of the 1991 Act and the 1951 Act; (3) if the answer to (1) was a lump sum, whether the first and second defendants had unjustly enriched themselves; (4) whether the trustees had acted in breach of trust; (5) whether the first and second defendants and the

trustees had acted in contravention of the 1951 Act (whilst it was in force) and the 1991 Act in deducting the employers' contribution to the EPF and of the interests and/or dividends declared by the EPF thereto from each of the plaintiffs' total EPF entitlement at the material time; (6) whether the RBF trust deed and the 1976 Regulations, which purported to authorise deductions of the employers' contributions to the EPF, was ultra vires the 1951 Act (whilst it was in force) and the 1991 Act; (7) whether any formula adopted by the first and second defendants and the trustees thereof for the calculation of the plaintiffs' RBF entitlement, which resulted in a diminution or reduction of entitlement based on the employers' contribution to the EPF would be ultra vires the 1951 Act (whilst it was in force) and the 1991 Act; (8) whether pursuant to s 9(1) of the 1951 Act and s 47(1) of the 1991 Act, an employer was entitled to deduct in any manner howsoever described from the wages or remuneration of the employee the contribution of the employer to the EPF on behalf of the employees, and the dividends declared by EPF in favour of the employee which stood to the credit of the employee; (9) whether the first and second defendants could in law deduct their contributions on behalf of the employee to the PF and the interest generated thereon from the plaintiffs' RBF entitlement; (10) whether the deductions referred to in (1) to (5) above by the first and second defendants and the trustees from the retirement benefits of the plaintiffs under the RBF and PF were impugnable as inequitable, unconscionable and amounting to unjust enrichment in law; (11) whether by reason of the deductions referred to above by the first and second defendants, the plaintiffs were entitled to a full reimbursement and restitution of their total RBF and PF entitlements; and (12) whether by reason of the unauthorised deductions, the trustees were in breach of trust and of their fiduciary obligations to the plaintiffs.

Held:

(1) The answer to the questions posed depended on the answers to two principal issues, namely, whether the retirement benefits given to the plaintiffs under the RBF were remuneration or wages within the meaning of s 9(1) of the 1951 Act and s 47(1) of the 1991 Act and if so, whether the authorised deductions made pursuant to the 1976 Regulations were deductions within the meaning of ss 9(1) and 47(1) of the 1951 Act and the 1991 Act respectively (see para 43).

(2) The purpose or objective of the 1951 Act and the 1991 Act is to provide for a retirement benefit fund to which the employer and the employee are required to contribute in the proportion specified by the law. The employee's contributions are deducted from the employee's remuneration payable under his contract of service whilst the employer's contributions come from the employer's own fund. Therefore, the larger the contributions made to the fund, the bigger the amount standing to the credit of the employee. This would translate into better financial security for the employee on his or her retirement. It is to enable this objective to be met that the term 'remuneration' should be given a very broad and liberal meaning to

include all money due and payable to an employee under a contract of service. Further, since no definition has been given to the term 'remuneration' in either the 1951 Act or the 1991 Act, its plain and ordinary meaning must be attributed to that word. Being social legislation, the 1951 and 1991 Acts must also be given a liberal interpretation. Given this broad and liberal interpretation, the word 'remuneration' comprised the retirement benefits paid to the plaintiffs (see paras 70, 71 and 76).

(3) The retirement benefits were remuneration payable under a contract of service for the purpose of s 9(1) of 1951 Act and s 47(1) of the 1991 Act. The first and second defendants' policy was to offer a total remuneration package to their employees, which included, amongst other things, retirement funds. This total package made it attractive to work for the first and second defendants and it would be natural for the first and second defendants' employees to have legitimate expectations to get what was being offered (see para 83).

(4) The defendants' contention that the RBF was intended to provide the plaintiffs with a guaranteed level of payment upon the plaintiff's retirement was not accepted. Further, the defendants' manual clearly stated that the RBF was an additional benefit offered to the plaintiffs as employees of the first and second defendants in addition to any provident fund or retirement benefits scheme set up by the Government for employees. Since it was an additional benefit, it should be over and above what was enjoyed by the plaintiffs by way of EPF contributions. The first and second defendants cannot now say that although they had promised the RBF as an additional benefit to the other provident or retirement funds set up by the Government, they cannot give the full benefits because they had contributed to the EPF (see paras 95 and 96).

(5) Section 9(1) of the 1951 Act and s 47(1) of the 1991 Act clearly provided that 'Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution from the employee'. There is no ambiguity in these provisions and the expression 'or otherwise recover' therein should be given a broad interpretation. This means that what the employer cannot do directly, he also cannot do indirectly, as in this case. If the first and second defendants were allowed to deduct the amounts they had contributed to the EPF from the employees' retirement benefits, it would make the RBF illusory (see para 96).

(6) The elements required to prove unjust enrichment are as follows: (a) the receipt of the benefit must have enriched the defendant; (b) the benefit must have been gained at the plaintiff's expense; and (c) it would be unjust to allow the defendant to retain that benefit. The question to ask therefore is what benefits did the first and second defendants receive and gain at the expense of the plaintiffs. Counsel for the plaintiffs submitted that the benefits were in the form of tax

deductions arising from the first and second defendants' contributions to RBF, an allowable cost claimed by the first and second defendants for their contributions to EPF and RBF for the purposes of production sharing contracts with Petronas, and the deductions made to the retirement benefits. The tax deductions enjoyed by the first and second defendants for their contributions to the RBF and the allowable cost under the production sharing contract are irrelevant. There is nothing wrong with the first and second defendants enjoying tax deductions under the relevant laws. Likewise, the first and second defendants may enjoy the allowable cost if this was agreed contractually between Petronas and them. The benefits received by the first and second defendants by reason of operation of laws or contractual agreements cannot be regarded as benefits received at the expense of the plaintiffs. As for the deductions, the trustees had to comply with the Regulations of 1976, including making the deductions thereunder. The amount deducted from the retirement benefit was not paid to the first and second defendants. Thus, the plaintiffs cannot say that the first and second defendants have had the benefit of the deductions at the expense of the plaintiffs. For these reasons, the answer to the questions on the issue of unjust enrichment is in the negative (see paras 99–102).

(7) On the issue of breach of trust by the trustees in permitting the unlawful deductions to be made from the fund, the trustees in this instant case were not exercising any discretionary power to effect the deductions from the plaintiffs' retirement benefit. They merely carried out the duty imposed on them by the 1976 Regulations in administering the RBF. Though a trustee must always act in the interest of the beneficiary, he also has the duty to observe the terms of the trust. As such, the deductions as authorised by the 1976 Regulations without first obtaining independent legal advice as to their validity, did not amount to a breach of trust (see paras 103 and 107).

(8) Accordingly, in respect of question (1), the benefit payable to a member was a lump sum equivalent to the level of benefit in reg 5(3)(a) of the 1976 Regulations. In respect of questions (2), (5), (6) and (11), the answer was in the positive. As regards question (11), although there was no unjust enrichment by the first and second defendants and the trustees did not commit any breach of trust, the deductions made were unlawful and void as against ss 9(1) and 47(1) of the 1951 Act and the 1991 Act respectively. Therefore, the amount so deducted should be refunded to the plaintiffs in full. As for questions (3), (4), (8), (9), (10) and (12), the answer was in the negative. It was not necessary to answer question (7), as it was framed too broadly and did not specify the provisions of the trust deed and the regulations in which such formula might be used (see para 108)

(9) Consequently, it was ordered, inter alia, that restitution be made to the plaintiffs of all sums deducted from their entitlements and that an account to be taken (see para 109).

[Bahasa Malaysia summary

Plaintif adalah bekas pekerja defendan pertama dan kedua dan pada masa tersebut merupakan ahli Tabung Faedah Persaraan Shell Sarawak dan Sabah('RBF') ataupun Tabung Simpanan Shell Sarawak dan Sabah ('PF'). RBF dan PF (tabung tersebut) terbentuk melalui surat ikatan amanah dan peraturan ini diawasi oleh (Peraturan 1976). Tuntutan plaintif terhadap defendan adalah mengenai hak plaintif dibawah RBF dan PF. Plaintif mendapati bahawa potongan telah dibuat untuk RBF dan PF, inter alia, telah dibuat dari perolehan defendan pertama dan kedua terhadap Kumpulan Wang Simpanan Pekerja (KWSP) dan faedah dan dividen yang telah diperoleh didapati dari amanah, surat ikatan RBF yang digunakan dalam s 9 Akta Kumpulan Wang Simpanan Pekerja (Akta 1951) dan s 47(1) Akta Kumpulan Wang Simpanan Pekerja (Akta 1991) dan merupakan ultra vires Akta lain.

Pihak-pihak tersebut telah memohon di bawah O 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menjawab fakta perundangan permulaan untuk ditentukan oleh mahkamah (1) sama ada, dalam menafsirkan Peraturan 1976, faedah yang perlu dibayar kepada seorang ahli adalah jumlah yang sama dengan 'tahap faedah yang terpakai' seperti yang terkandung dalam per 5(3)(a) atau suatu jumlah besar yang cukup untuk meningkatkan agreget caruman ke tahap faedah yang diperuntukkan di bawah per 5(3)(a); (2) sama ada sekiranya jawapan kepada (1) adalah bayaran sekaligus dan jika pengiraan tersebut memungkiri provisio dalam Akta 1991 dan 1951; (3) jika jawapan kepada (1) adalah sekaligus dan jika defendan pertama dan kedua menguntungkan diri mereka secara tidak sah; (4) sama ada pemegang amanah telah memecah amanah; (5) sama ada defendan pertama dan kedua dan pemegang amanah telah mematuhi Akta 1951 (ketika ia masih dikuatkuasakan) dan Akta 1991 telah memotong caruman majikam terhadap EPF atau dividen yang diberikan oleh EPF dan faedah atau dividen yang diberikan pada EPF pada masa tersebut; (6) sama ada amanah RBF dan per 1976 yang membenarkan potongan gaji dan caruman majikan terhadap EPF adalah Akta ultra vires Akta 1951 (ketika dikuatkuasakan) dan Akta 1991; (7) sama ada formula yang digunakan oleh defendan pertama dan kedua amanah itu dan pengiraan wang yang diterima oleh plaintif yang menyebabkan pengurangan wang bersasarkan caruman terhadap EPF merupakan ultra vires Akta 1951 (yang dikuatkuasakan) dan 1991; (8) sama ada merujuk kepada Akta 9(1) dari Akta 1951 dan s 47(1) dari Akta 1981 majikan boleh mencarum apa cara yang diterangkan dari gaji pekerja dan dividen yang dibayar oleh pekerja dan dividen yang diberikan EPF untuk pekerja adalah kredit kepada majikan; (9) sama ada defendan pertama atau kedua dapat memotong caruman mereka bagi pekerja kepada PF dan faedah yang diperolehi dari wang yang patut diterima dari caruman RBF; (10) jika pemotongan dirujuk kepada (1) hingga (5) dari defendan pertama dan kedua dan pemegang amanah dari persaraan dan faedah yang diperolehi plaintif dibawah RBF dan PF tidak boleh diterima dan adalah tidak adil dari segi undang-undang; (11) sama ada sebab pemotongan itu dirujuk kepada defendan pertama dan kedua dan plaintif

patut menerima wang pulangan yang penuh dan jumlah penuh RBF dan PF; (12) sama ada terdapatnya pengeluaran wang yang tidak dibenarkan pemegang amanah telah pecah amanah dan kewajipan fidusiari.

Diputuskan:

(1) Jawapan kepada soalan yang disoal terpulang kepada jawapan dua prinsip iaitu bilakah faedah persaraan diberi kepada plaintif di bawah RBF dan jika gaji tersebut jatuh dalam maksud s 9(1) Akta 1951 dan s 47(1) dari Akta 1991 dan jika pemotongan gaji yang dibenarkan dibuat dari per 1976 dan pemotongan makna s 9(1) dan s 47(1) dari Akta 1951 dan 1991 (lihat perenggan 43).

(2) Objektif Akta 1951 dan 1991 adaklah untuk menyediakan satu faedah persaraan dimana majikan dan pekerja diminta untuk mencarumkan sebahagian dari gaji pekerja dan majikan akan mengeluarkan wang tersebut dari simpananya sendiri.lebih besar caruman yang dibuat lebih besar kredit pekerja wujud. Pekerja akan mempunyai pendirian kewangan yang kukuh apabila pekerja bersara. Objektif ini adalah luas dan patut merangkumi semua wang yang patut dibayar kepada pekerja dibawah kontrak perkhidmatan. Memandangkan tiada definise kepada perkatan 'remuneration' dalam Akta 1951 dan 1991 Akta tersebut juga mesti diberi definasi yang luas. Jadi 'remuneration'juga bermaksud faedah persaraan (lihat perenggan 70, 71 dan 76).

(3) Faedah persaraan adalah hasil yang diterima dari kontrak perkhidmatan dalam s 9(1) 1951 dan 1991. Polisi defendan pertama dan kedua adalah adalah memberikan pakej gaji yang menarik dan termasuk faedah persaraan. Pakej ini menarik dan pekerja defendan pertama dan kedua mempunyai harapan untuk mendapat apa yang ditunjukkan (lihat perenggan 83).

(4) Defendan berpendapat bahawa RBF adalah untuk memberikan plaintif jaminan pembayaran yang tidak diterima tambahan pula manual defendan jelas menunjukkan bahawa RBF adalah faedah tambahan yang ditawarkan pada pekerja iaitu plaintif dari defendan pertama dan kedua sebagai tambahan kepada apa yang ditawarkan oleh kerajaan. Memandangkan ini merupakan faedah tambahan ianya lebih dari apa yang diperolehi dari EPF. Defendan pertama dan kedua juga tidak dapat menjelaskan bahawa walaupun mereka telah berjanji memberi faedah tersebut dan sekarang tidak boleh memberi faedah yang dijanjikan kerana turut mencarum kepada EPF (lihat perenggan 95 dan 96).

(5) Seksyen 9(1) 1951 dan 47(1) Akta tersebut jelas menyatakan 'Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer contribution from the employee' tidak ada ketidakpastian dalam Akta ini dan ayat ini 'or otherwise recover' patut diberikan interpretasi yang luas. Majikan tidak boleh berbuat secara langsung atau tidak. Jika defendan

pertama dan kedua dibenarkan memotong hasil yang dicarumkan ke EPF dari faedah persaraan pekerja dan RBF adalah ilusi (lihat perenggan 96).

(6) Faktor yang patut dibuktikan untuk menunjukkan faedah persendirian yang tidak sah adalah: (a) resit dari faedah tersebut mesti memfaedahkan defendan; (b) faedah diperolehi dari kewangan plaintif; (c) tidak adil membenarkan defendan memegang faedah tersebut, soalan yang ditanya adalah apakah faedah yang diperolehi defendan pertama dan kedua atas kewangan plaintif.peguam plaintif telah menyerahkan faedah dalam borang cukai yang timbul dari caruman dari RBF dan EPF untuk sebab kontrak dikongsi dengan Petronas dan potongan dibuat dari faedah persaraan. Tidak salah defendan pertama dan kedua menikmati potonagn cukai yang dibuat oleh undang undang berkenaan. Faedah yang diterima oleh defendan pertama dan kedua adalah dari segi operasi undang-undang dan atas kewangan plaintif atas potongan itu. Faedah yang diterima oleh defendan pertama dan kedua adalah sebab operasi undang-undang dan perjanjian secara kontrak dan tidak boleh dierima sebagai faedah diterima dari kewangan plaintuf. Untuk potonagn ynag dibuat pemegang amanah telah mengikut per 1976 termasuk membuat potongan. Pemotongan ini dibuat dari faedah persaraan dan tidak dibayar ke defendan pertama dan keduanya plaintif tidak boleh menyatakan bahawa defendan tersebut telah memperolehi faedah persendirian dari tabung plaintif (lihat perenggan 99–102).

(7) Isu memecah amanah oleh pemeganga amanah membenarkan pemotongan yang tidak sah dibuat dari simpanan tersebut, pemegang amanah disini tidak menjalankan apa-apa kuasa untuk memotong faedah persaraan plaintif. Mereka menjalakan tugas yang tertakluk dalam per 1976 dalam mentadbir RBF. Walaupun pemegang amanah mesti akur terhadap faedah benefisiari dia juga ada tugas untuk menjaga terma amanah tersebut. Pemotongan yang dibenarkan dalam per 1976 tanpa memperolehi khidmatan undang-undang tidaklah satu unsur pecah amanah (lihat perenggan 103 dan 107).

(8) Mengikut soalan pertama faedah yang dibayar kepada ahli adalah secara sekaligus dan sama dengan faedah per 5(3)(a) dalam Peraturan 1976. Dalam soalan (2), (5), (6), (11) jawapannya adalah ya. Soalan (11) walaupun tiada faedah persederian dari defendan pertama dan kedua pemegang amanah tidak memecah amanah, tetapi pemotongan yang dibuat adalah salah di segi undang-undang dan tidak sah jadi amaun yang dipotong patut dikembalikan kepada defendan dengan serta merta. Jawapan kepada soalan (3), (4) , (8) , (9), (10) dan (12) adalah dalam negatif, soalan ke (7) adalah terlalu luas dan tidak menyatakan pemakaian spesifikasi peruntukan dalam surat ikatan amanah dan peraturan dimana formula itu patut digunakan (lihat perenggan 108).

(9) Kesimpulannya plaintif mendapat semula kesemua wang yang ditolak (lihat perenggan 109).]

Notes

For cases on essential ingredients, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4862.
For cases on contributions of provident fund, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1445-1449.
For cases on breach of trust, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2243.

Cases referred to

Air Jamaica Ltd v Charlton [1999] 1 WLR 1399 (refd)
Consolidated Plantations Bhd v Ethambaram [1993] 1 MLJ 1 (refd)
Cowan v Scarfill [1984] 2 All ER 750 (refd)
Hillsdown Holdings plc v Pensions Ombudsman and Others [1977] 1 All ER 862 (refd)
Imperial Group Pension v Imperial Tobacco [1991] 2 All ER 597 (refd)
Korso Finance Establishment Anstalt v John Wedge (unreported, 15 December 1994) (refd)
Mettoy Pension Trustees case [1991] 2 All ER 513 (refd)
Neoh Choo Ee Sdn Bhd v Vasalmany & Anor [2004] 4 AMR 357 (refd)
Palmco Holdings Bhd v Commissioner of Labour & Anor [1986] 1 MLJ 492 (refd)
Parry v Cleaver [1969] 1 All ER 555 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen [1998] 1 MLJ 465 (refd)
Pereira v Hotel Jayapuri [1986] 2 MLJ 1 (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Trengganu & another appeal [2003] 4 CLJ 337 (refd)
Som Prakash Rekhi v Union of India & Anor [1981] 2 SCR 111
The Halcyon Skies [1976] 1 All ER 856 (refd)
The Queen v Postmaster General [1876] QBD 658 (refd)

Legislation referred to

Employees Provident Fund Act 1951 s 9(1)
Employees Provident Fund Act 1991 s 47(1)
Employment Act 1955 s 60J(1)
Employment (Termination and Lay-Off Benefits) Regulations l980 reg (2)
Rules of the High Court 1980 O 14A, O 33 r 2

Cyrus Das (Eric Khoo & Gabriel Kok with him) (Khoo & Co) for the plaintiff
Cecil Abraham (Jimmy HT Wee with him) (Jimmy HT Wee & Co) for the defendants

Abdul Aziz JC:

[1] By an amended writ dated 29 November 2002 and a statement of claim dated 23 August 2003, the plaintiffs prayed for a number of declarations and other incidental orders against the defendants. The declarations prayed for are as follows:

(1) A declaration that reg 5(2) read with the reg 7(1)(c) of the Retirement Benefit Fund ('the RBF') Trust Deed and Regulations of 1976 (as updated in 1993 and 1996) contravenes s 9(1) of the Employees

Provident Fund Act 1951 (until its repeal on 1 June 1991) and is accordingly ultra vires the Employees Provident Fund Act 1991.

(2) A declaration that reg 5(2) read with reg 7(1)(c) of the RBF Trust Deed and Regulations of 1976 (as updated in 1993 and 1996) contravenes s 47(1) of the Employees Provident Fund Act 1991 and is accordingly ultra vires the Employees Provident Fund Act 1991.

(3) A declaration that all deductions from the RBF by the first and/or second defendants of their contributions to the EPF for the plaintiffs and for the interest and/or dividends which were declared by the EPF in favour of the plaintiffs, throughout the plaintiffs' tenure of service with the first and second defendants, are illegal, null and void.

(4) A declaration that all deductions from the RBF by the first and/or second defendants of their contributions for the plaintiffs to the PF and for the interests generated thereon throughout the plaintiffs' tenure of service with them, are illegal, null and void.

(5) A declaration that the first and/or second defendants had unjustly enriched themselves at the expense and/or detriment of the plaintiffs by purporting to effect the aforesaid deductions from the plaintiffs RBF entitlement.

(6) A declaration that the third to ninth defendants are in breach of trust in the terms stated in paragraph 33 of the statement of claim and for further failing to make restitution of the said unauthorised deductions to the credit of each of the plaintiffs.

[2] Then, by summons in chambers dated 14 November 2003 (encl 30), the defendants applied to the court under O 14A of the RHC 1980 to have certain preliminary questions of law be determined by the court. In this application, the defendants proposed all together four questions namely questions No 1 to No 4 as stated below. The application is supported by three affidavits by the defendants. The first affidavit was affirmed by Lim Tau Kim on 11 November 2003 ('Lim's affidavit'). The second affidavit was affirmed by Shamsuflan Shamsuddin bin Alias on 17 June 2004 ('Shamsuddin's affidavit') and the third affidavit was also affirmed by Shamsuflan Shamsuddin bin Alias on 29 July 2004 ('Shamsuddin's second affidavit'). In reply to these affidavits, the plaintiffs had filed two affidavits affirmed by Chong Thian Fook on 9 June 2004 ('Chong's first affidavit') and 16 July 2004 ('Chong's second affidavit') respectively. On 21 April 2004, the plaintiffs also filed a summons in chambers (encl 56) application under the same O 41A, O 33 r 2 of the RHC 1980 for an order that eight (8) questions on the same issues be put to the Court for determination under the said Rules. These eight questions are questions No 5 to No 12 as stated below. This application is supported by Chong Thian Fook's affidavit affirmed on 21 April 2004. The defendants' application (encl 30) came up for hearing on 26 April 2004. At the hearing, the parties had come to an agreement that, in addition to the four questions referred to by the defendants in their application (encl 30), and the eight questions proposed by the plaintiffs in their application (encl 56), all should be put to the court

for determination under O 14A of the RHC 1980. Hence, by the Consent Order entered on the 26 April 2004, the twelve questions are before the court for determination. I then fixed the case for pre-trial case management on 23 June 2004. On that day, the parties informed the court that pursuant to the Court's earlier directions, the parties had completed the exchange of affidavits in respect of the application. On the same day, Mr Gabriel Kok, learned counsel for the plaintiffs, informed the Court that he had instruction to withdraw the plaintiffs' application in encl 56. So I accordingly struck off encl 56 with no order as to costs. Thus, remain only the application in encl 30 with the agreed twelve questions for determination. These twelve questions have been grouped together and put in as bundle of 'issues to be tried'. These issues are stated as follows:

Issues to be Tried

1) Upon a construction of the Regulations of the Shell Sarawak and Sabah Retirement Fund as to whether the benefit payable to a member is either:
   (a) the sum equal to what is specified as the 'level of benefit applicable' as mentioned in reg 5(3)(a); or
   (b) is a lump sum which is sufficient to bring the aggregate of the contributions (as hereinafter defined) up to the level of benefits specified in reg 5(3)(a).

   (The term 'contributions' is defined to mean the contributions made by the Employing Company to the Employees Provident Fund, the Shell Sarawak and Sabah Provident Fund other specified Funds and the interest thereon).

2) If the answer to Issue 1 is as (b) above, then whether such a calculation is in breach of the provisions of the Employees Provident Fund Act 1991 and its statutory predecessor, the Employees Provident Fund Act 1951.

3) If the answer to Issue 1 is as (b) above, then whether as a matter of law the Employing Companies in question have unjustly enriched themselves by reason of the payment of benefit in the manner contended for by the Defendants.

4) If the answer to Issue 1 is as (b) above, then whether as a matter of law the third to ninth defendants have acted in breach of trust by reason of the payment of benefits in the manner contended for by the defendants.

5) Whether the first and second defendants and the Trustees of the Fund (the third, fifth, sixth and seventh defendants) thereof acted in contravention of the Employees Provident Fund Act 1951 ('the 1951 Act') (whilst in force) and the Employees Provident Fund Act 1991 ('the 1991 Act') (currently in force) in effecting deductions of the employers' contribution to the EPF and of the interests and/or dividends declared by the EPF thereto from each of the plaintiffs' total EPF entitlement at the material time?

6) Whether reg 5(2) read with reg 7(1)(c) of the RBF Trust Deed and Regulations 1976 (as updated in 1993 and 1996) which purport to authorise deductions of the employer's contributions to the EPF is ultra vires the 1951 Act (until its repeal) and the 1991 Act (currently in force)?

7) Whether any formula adopted by the first and second defendants and the Trustees thereof for the calculation of the plaintiffs' RBF entitlement, under the said 1976 Deed resulting in a diminution or reduction of entitlement based on the employers' contribution to the EPF, would be ultra vires the 1951 Act and 1991 Act?

8) Whether pursuant to s 9(1) of the 1951 Act and the current s 47(1) of the 1991 Act, an employer is entitled to deduct in any manner howsoever described from the wages or remuneration of the employee the contribution of the employer to the EPF on behalf of the employees, and the dividends declared by EPF in favour of the employee which stood to the credit of the employee?

9) Whether the first and second defendants could in law deduct their contributions on behalf of the employee to the PF and the interest generated thereon, from the plaintiffs RBF entitlement?

10) Whether the deductions referred to in paragraphs 1 to 5 above by the first and second defendants and the Trustees thereof from the retirement benefits of the plaintiffs (under the RBF and PF) are impugnable as inequitable, unconscionable and amounting to unjust enrichment (of the first and second defendants) in law?

11) Whether by reason of the deductions referred to above by the first and second defendants, the plaintiffs are entitled to a full reimbursement and restitution of their total RBF and PF entitlements?

12) Whether by reason of the unauthorised deductions, the third, fifth, sixth and seventh defendants as Trustees are in breach of trust and of their fiduciary obligations to the plaintiffs as members at the material times and of their continuing obligations to them as former members in failing to take appropriate restitutionary steps or at all?

[3] For the purpose of determining the above issues, the following documents, in addition to the aforementioned affidavits, were tendered and marked in court:

a) Bundle of pleadings –'A';

b) Agreed Bundle of Documents – 'B';

c) Agreed Statement of Facts – 'C', and

d) Issues for Determination – 'D'.

[4] There is another matter that I need to put on record. Applications in enclosures 30 and 56 were filed as chambers' applications. However, by consent of the parties the hearing was adjourned to open court because the

number of plaintiffs involved is quite large, over 300 of them; and they are interested to follow the proceedings in full. Also, under O 14A there is an option that the application under that Rule may be either by summons in chambers or by motion.

Background Facts

[5] All the plaintiffs are former employees of the first and second defendants and were at all material times members of the Shell Sarawak and Sabah Retirement Benefit Fund ('the RBF') or the Shell Sarawak and Sabah Provident Fund ('the PF'). Currently, all the plaintiffs are ex-members of the RBF or the PF. Both the RBF and PF are the domestic retirement benefit/provident funds of the first and second defendants and shall be referred to collectively as 'the Funds'.

[6] The plaintiffs were also at all material times members of the statutory Employees Provident Fund ('the EPF') under the relevant statutes.

[7] The third, fifth, sixth and seventh defendants are the members of the Board of Trustees of the Funds at the time of the filing of the suit herein and are being sued in that capacity. The registered address of the Board of Trustees is at Bangunan Shell Malaysia, off Jalan Semantan, Damansara Heights, Kuala Lumpur.

[8] Prior to 1970, the first and second defendants had two domestic pension funds for their employees, namely, the Shell Borneo Thrift Fund ('SBTF'), which was a contributory pension fund for the labour category of employees, and the Shell Malaya Retiring Fund ('SMRF') which was a non-contributory pension fund for the staff category of employees.

[9] The Employees Provident Fund Act 1951 (Act 272) (since repealed) was extended to Sabah on 1 September 1969 and Sarawak on 11 March 1968 and both the first and second defendants were required to make the requisite statutory contributions for the plaintiffs, as their employers. The first and second defendants made EPF contributions for the plaintiffs, in addition to their contributions to the relevant domestic retirement benefit/provident funds.

[10] On or about 8 March 1968, the SBTF was wound up. It was replaced by the PF, which is a contributory domestic provident fund and it covered all categories of Malaysian employees of the first and second defendants. The Trust Deed and Regulations of the PF, are exhibited as exhibit 'A' in Chong's first affidavit – (encl 65).

[11] Before the coming into force of the 1951 Act in East Malaysia, both the first and second defendants (as the employers) and the plaintiffs (as the employees) were required to make contributions to the PF at the rate of 10% of the employees' basic monthly salary at the material time. The contributions made to the PF were invested through a fund manager appointed by the Board of Trustees of the PF at the material time, and out of these investments interest was generated and included into the PF, purportedly as a retirement benefit for the plaintiffs.

[12] Upon the 1951 Act coming into force in East Malaysia, all employees of the first and second defendants earning a salary of RM500 and below were given an option of continuing to contribute to the PF as well as making compulsory contributions to the EPF. However, all the said employees were subsequently required to compulsorily contribute to the EPF regardless of their salary.

[13] Also, on or about 8 March 1968, the SMRF was wound up. It was replaced by a non-contributory domestic pension fund known as the Shell Sarawak and Sabah Pension Fund ('SSS Pension Fund'). It was to cover all Malaysian employees of the first and second defendants in the staff category.

[14] Under the SSS Pension Fund, the employees concerned were to receive pension payments from the first and second defendants. There were no deductions whatsoever from payments made out of the SSS Pension Fund to the employees on account of any contribution made by the first and second defendants to either the PF or the EPF upon their retirement. On or about 1 January 1976, the SSS Pension Fund was dissolved and the RBF was established. The RBF covered all the Malaysian employees of the first and second defendants (ie staff and labour category). Further, all contributions made by the first and second defendants to the SSS Pension Fund 2 were transferred to the RBF as their initial contribution to the RBF. However, no account was given of the status of the fund vis-a-vis individuals at the time of the transfer. The Trust Deed and Regulations of the RBF are exhibited and marked as exhibit 'B' in Chong's affidavit – encl 65.

[15] Subsequently the 1951 Act was repealed and replaced by the 1991 Act with effect from 1 June 1991.

[16] The terms and conditions underlying the PF are as provided for in the Trust Deed and Regulations dated 8 March 1968 (exhibit A to Chong's first affidavit), which came into effect on 1 January 1968 (referred to as 'the 1968 Deed'). The 1968 Deed was later updated in 1996.

[17] The terms and conditions underlying the RBF are as provided for in the Trust Deed dated 6 December 1976 which came into effect on 1 January 1976 together with the Regulations made thereunder (referred to as 'the 1976 Deed') (exhibit B). The said 1976 Deed was subsequently updated in February 1993 and January 1996 (referred to as 'the 1993 Deed' and 'the 1996 Deed'). The 1976 Deed was subsequently revised in February 1993, inter alia, to modify the computation of the benefits in reg 5 therein. It was revised again in January 1996 with no substantial or material amendments for the instant purposes.

Statement of Agreed Facts

[18] The parties have agreed to the following facts in a Statement of Agreed Facts. The plaintiffs were employees of the first and/or second defendants and were members of the Shell Sarawak and Sabah Retirement Benefit Fund (referred to as 'the Retirement Benefit Fund') before their retirement. Some

of the plaintiffs were also members of the Shell Sarawak and Sabah Provident Fund (hereinafter referred to as 'the Provident Fund'). A

[19] The current Trustees of the Retirement Benefit Fund and the Provident Fund are as follows:

(a) Paulus Albertus Maria Gerla B

(b) Ding Chung Nyea

(c) Surya Hidayat b Hj Abdul Malik

(d) Shamsuflan Shamsuddin bin Alias

[20] The plaintiffs' claim is in respect of the plaintiffs' entitlement under the provisions of the Retirement Benefit Fund and the Provident Fund. The Retirement Benefit Fund and the Provident Fund are constituted pursuant to two Trust Deeds namely The Provident Fund Trust Deed 1968 and The Retirement Benefit Fund Trust Deed 1976 and the Regulations made under the Trust Deeds, both of which are contained in the Agreed Bundle of Documents. C D

[21] The plaintiffs were given copies of the Retirement Benefit Fund Trust Deed dated 6 December 1976 and Regulations and the Provident Fund Trust Deed dated 8 March 1968 and Regulations at various times during the their tenure of service with the first and/ or second defendants. E

The Contentions by the Plaintiffs

[22] When the plaintiffs severally received their RBF entitlement from the first and/or second defendants, it was discovered that deductions had been effected for: F

(i) the first and/or second defendants' contributions to the EPF for the plaintiffs throughout their tenure of service with them;

(ii) the interests and/or dividends that were declared on the aforesaid contributions by the EPF;

(iii) the first and/or second defendants' contributions to the PF for the plaintiffs; G

(iv) the interest that had accrued from the aforesaid contributions by the first and/ or second defendants to the PF for the plaintiffs.

[23] The plaintiffs contend that the basic intentions of the RBF were as follows: H

1) to provide the plaintiffs as employees in the first and/or second defendants' employ, a retirement benefit payment which should reflect a percentage of the total take-home pay during their entire service period with the first and/or second defendants; I

2) to provide the plaintiffs with additional remuneration in addition to that already provided for by the EPF.

[24] The plaintiffs therefore contend that they had at all material times a legitimate expectation that the aforesaid basic intentions of the RBF would be fulfilled or satisfied.

[25] The plaintiffs contend however that the objectives of the RBF (as stated in paragraph 17 of the statement of claim) have not been achieved. In this regard, the plaintiffs state at least one or more of them left the service of the first or second defendants without receiving any entitlement at all. The plaintiffs also state that at least one or more of them had a negative entitlement, after the first or second defendants effected the purported 'authorised deductions' from their RBF entitlements.

[26] The plaintiffs contend that the first and second defendants acted in contravention of the law, particularly the 1951 Act (whilst in force) and the 1991 Act (currently in force) when it effected deductions of the employers' contribution to the EPF for the plaintiffs and the interest and dividends declared by the EPF in favour of the plaintiffs, from the plaintiffs' total RBF entitlement at the material time.

[27] The plaintiffs further contend that the provisions in the 1976 Deed (as updated in 1993 and 1996) which the first and second defendants purported to rely on in making the deductions of their contributions to EPF and the interest and dividends declared thereon by the EPF from the plaintiffs' RBF entitlement, are contrary to law and thereby null and void and of no effect.

[28] The plaintiffs contend that pursuant to s 9(1) of the 1951 Act and the current s 47(1) of the 1991 Act, an employer is not entitled to deduct from the wages or remuneration of, or otherwise recover from, the employee the employer's contribution to the EPF for the employee.

[29] The plaintiffs accordingly averred that the said deductions as aforementioned were in contravention of the said provisions of the 1951 Act and the 1991 Act.

[30] Therefore the plaintiffs, in addition to the aforementioned declarations, also pray for the following orders:

(1) an Order for restitution to the plaintiffs of all sums deducted from their entitlements together with all further sums due to them pursuant to the assessment as ordered herein;

(2) an Order for an account to be taken and for an assessment of all deductions made of the entitlements due to the plaintiffs under the RBF;

(3) for the purposes of the assessment referred to in paragraph 35(6) of the statement of claim, an Order that the first and second defendants do make all proper disclosures of relevant documents including corporate and taxation accounts for the purposes of the assessment;

(4) an Order that upon the aforesaid account being taken and assessment of deductions, as referred to in paragraph 35(6) of the statement of

claim, the first and/or second defendants do and are hereby ordered to make restitution and reimbursement to the plaintiffs of all sums duly found owing to them with interest at the rate of 8% pa from the relevant date of the deductions until full payment;

(5) and Order for damages for breach of trust;

(6) costs; and

(7) such further and other relief which this Honourable Court deems fit to grant.

The Defendants' Defence

[31] In their defence, the defendants contend that any legitimate expectation that the plaintiffs may have regarding their entitlement from the Funds was always subject to the terms and conditions set out in the Regulations, which have been complied with faithfully and in good faith by the trustees of the Funds.

[32] The first and second defendants deny that the objectives of the Funds have not been achieved.

[33] The defendants contend that, to the best of their information, the plaintiffs upon ceasing to be in service with the first and second defendants, have received what was in fact due to these plaintiffs in accordance with the Regulations of the Funds, in particular reg 5(2) of the RBF Regulations.

[34] The first and second defendants deny paragraph 32 of the Statement of Claim. The first and second defendants contend that by virtue of clause 5(a) of the Trust Deed to the RBF the first and second defendants are obliged to and have paid into the Funds such amounts as are necessary and as are required to keep the Funds actuarially solvent. In the circumstances, the first and second defendants do not obtain any advantage whatsoever from the manner the Funds are administered, and even if the plaintiffs' allegations are true, which is denied, the first and second defendants do not in any way at all benefit from or enrich themselves at the expense of the plaintiffs.

Opinions of the Court

[35] I shall begin by reproducing in full O 14A of the RHC 1980 which reads as follows:

1.(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein;

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

2. An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

[36] Thus, the purpose of this Rule is to enable the court to determine any question of law or construction of a document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein.

[37] As to the principles and the ambit of O 14A of the RHC 1980, the Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Trengganu & another appeal* [2003] 4 CLJ 337 (*'the Petronas case'*) at pp 351 and 352, adopted and followed the principles enunciated in the English Court of Appeal case of *Korso Finance Establishment Anstalt v John Wedge* (unreported, 15 February 1994; CA Transcript No 14/387). These principles are reproduced below:

1. An issue is 'a disputed point of fact or law relied on by way of claim or defence'.
2. A question of construction is well capable of constituting an issue.
3. If a question of construction will finally determine whether an important issue is suitable for determination under O 14A, and where it is a dominant feature of the case, a court ought to proceed to so determine such issue.
4. Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application (see The Supreme Court Practice 1999 Vol 1 paragraph. 14A/2/5).

[38] In its judgment, the Court of Appeal also cited with approval a passage in *Korso's* case which shows that a question of construction is capable of constituting an issue in a cause or matter that can be properly dealt with under O 14A of the RHC 1980. The passage cited by the Court of Appeal reads as follows:

> In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter.

The whole case does not have to disposed of. It is sufficient if substanstial matters can be disposed of.

The real question in this case at the end and really crucial one it seems to me is: will the court be able to dispose of the case or the major part of the case or the most significant issue in the case under O 14A dealing with the matter today. (see p 351 of [2003] 4 CLJ 237).

[39] In this instant case, the core issue is whether the 'reduction' of the retirement benefits under reg 5(2) of the 1976 Regulations to the RBF Trust Deed pursuant to 'authorised deductions' made by the trustees under reg 7(1)(c) of the same Regulations is valid and proper. This in turn depends on the construction placed on the meaning of 'authorised deductions' found in reg 7(1)(c); and based on the pleadings in this instant case, the meaning of the term 'authorised deductions' in reg 7(1)(c) must be construed in the light of the provisions of s 47(1) of the 1991 Act and its predecessor s 9(1) of the 1951 Act. The determination of the issues relating to the construction of these provisions would, in my mind, substantially if not finally, dispose of the cause or matter in this instant case. So applying the principles enunciated in the *Petronas* case (supra), this application by the defendants is one that is properly made under O 14A of the RHC 1980.

[40] But before I go to the merits of the application, I must remind myself of the parameters within which issues are to be considered under O 14A. In the *Petronas* case the Court of Appeal at p 355 laid down the parameters in the following passage:

On this issue we have to consider the law applicable to the interpretation and construction of statutes and documents in the lights of the facts pleaded. To begin with, let us set out certain established parameters within which the issue is to be considered. As O 14A is to be read with O 18 r 19 of the RHC it is proper to cite what was said by Sir Thomas Bingham MR in *E (A Minor) v Dorset County Council, x (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 693, HL, to the effect that applications of this kind are fought on the ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to the plaintiff if orders to strike out are indeed made only in plain and obvious cases. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleadings) the actual facts of the claim are bound to fail for want of cause of action, there is no reason why the parties should be required to prolong the proceedings before that decision is reached. The court is of course bound to approach each pleaded cause of action separately, and need not reach the same decision on each. One of the principles established in *Korso Finance Establishment Anstalt v John Wedge*, supra is that the respondents to an application under O 14A are not entitled to contend that they should be able to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the court should take account in construing the document, they must be taken to have known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the should not refrain from dealing with the application.

[41] In my opinion, the principles that can be gathered from the above quoted passage are these: O 14A is to be read with O 18 r 19. So read the court in appropriate cases may strike out the plaintiff case for want of cause of action. The court should consider each pleaded cause of action separately and may arrive at different decision on each of the pleaded cause of actions. This means the court may make a final order on one cause of action pleaded and order the remaining cause of action to tried. As to the evidence to be considered in the O 14A application, the plaintiff is presumed to have pleaded its best case; and the respondent to the application should not be allowed to hunt for evidence to explain the meaning of the relevant document. The court may presume that the parties must have known any special circumstances surrounding the construction of the relevant documents. However, in the absence of such evidence, the court should not be reluctant to deal with the application.

[42] Thus, in dealing with the application under O 14A in this instant case, the court may, besides the bundles of document and the bundle of pleadings that have been tendered and marked, look at the documents filed as exhibits in the affidavits in support and in opposition to the application. In particular the court may have regard to the circumstances in which the Trust Deeds and the Regulations in question were made and the circumstances leading to the creation or establishment of the retirement benefits of its employees by the first and the second defendants.

[43] Applying the above principles, I now proceed to determine the questions posed to this court. In my view, the answer to these questions depends on the answer given to two principal issues namely: first, are the retirement benefits given to the plaintiffs under the RBF a 'remuneration' or 'wages' within the meaning of s 9(1) of the 1951 Act and its successor s 47(1) of the 1991 Act, and second, if it is so, are the authorised deductions made pursuant to reg 7(1)(c) of the 1976 Regulations a 'deduction' within the meaning of the two mentioned sections.

[44] It was submitted for the plaintiffs that the objective and purpose of the Funds were to provide the Malaysian employees of the first and second defendants, like the plaintiffs, with adequate financial provision on their retirement and a measure of financial security for their dependants. Dato' Cyrus Das, learned counsel for the plaintiffs submitted that this objective and purpose is apparent from the various statements found in the first and second defendants' document on Human Resources Policies and Procedural Manual ('the Manual'). This Manual is exhibited as Exhibit K to Chong's first affidavit and also as an agreed document in the Agreed Bundle B at pp 74–115. Paragraph 2.14 of the Manual states the first and second defendants' policy on Pension Funds and Retirement Benefits for their Malaysian employees as follows:

> 2.14 PENSION FUNDS AND RETIREMENT BENEFITS (MALAYSIAN EMPLOYEES)
>
> Policy: In addition to the Government operated Employees Provident Fund (EPF), it is the Company's policy to provide further retirement benefit schemes

designed to assist employees to make adequate financial provision for their retirement from the Company service and provide a measure of financial security for their dependants.

The Company's retirement schemes are known as the Defined Contribution Scheme (DCS), the Shell Sarawak and Sabah Retirement Benefit Fund (SSSRBF) the Shell Sarawak and Sabah Provident Fund (SSSPF). The DCS is applicable to new employees who joined the Company on or after 1 January 1997 and those employees who have opted to join the DCS. The SSSRBF is applicable to employees who joined the Company before 1 January 1997 and have not opted out. Upon confirmation of employment, all permanent employees are eligible to join SSSPF.

Employees' rights and obligations under the SSSRBF and the SSSPF are set out in full in the Trust Deed and Regulations, which are the authoritative legal sources in all matters relating to these Funds.

[45] The above policy statement by the first and second defendants as to the establishment of the Pension Fund and Retirement Benefits for their Malaysian employees leaves no room for doubt as to the objective and purpose of the Funds. It is also clear from the policy statement that documents to be used in construing the purpose, objective, scope and 'all matters relating to the Funds' are the Trust Deed and the Regulations made under the Trust Deed. The Trust Deed and the Regulations referred to in paragraph 2.14 of the Manual obviously, in my opinion, refers to the Trust Deed and the Regulations of 1976 with all the updates.

[46] The defendants did not deny or challenge this submission by the learned counsel for the plaintiffs. Instead Dato' Cecil Abraham, learned counsel for the defendants, submitted that the RBF is intended to provide its members (which included the plaintiffs) with a guaranteed level of payment upon the members' retirement. He further submitted that the guaranteed level of payment is not derived solely from the RBF. It is derived, learned counsel submitted, from the contributions made by the employing companies (ie the first and the second defendant and any other companies designated under the Trust Deed) together with the interest thereon to the Employees Provident Fund, the Provident Fund and any other funds the Trustees may designate.

[47] In my opinion the fact that the RBF is intended to provide its members with a guaranteed level of payment upon retirement does not change the purpose or object of its establishment. But on the contrary it supports the submissions by learned counsel for the plaintiffs that the Funds are to provide for financial provision for employees and their dependants upon the employees' retirement from the services of the first and second defendants. It does not matter from which source the Funds get their money to provide for the benefits. This is so because any money that comes into the Funds, either by agreed contributions by the employing companies or by the transfer of any money or contributions from another fund, the money that comes into the Funds shall be used to provide for the members retirement benefit in accordance with the terms and conditions of the Trust Deed and the Regulations that govern the Funds.

[48] Next learned counsel for the plaintiffs submitted that the RBF is a Fund to financially provide for the plaintiffs on their retirement and it is akin or similar to a pension fund. Therefore, it was submitted that any document relating to the establishment and operation of the Fund must be given a liberal and purposive interpretation so as to give reasonable and practical effect to the purpose of the establishment of the Fund. Learned counsel for the plaintiffs cited a passage in *Mettoy Pension Trustees case* [1991] 2 All ER 513 at 537 where Warner J said:

> The court's approach to the construction of documents relating to a pension scheme should be practical and purposive rather that detached and literal.

[49] I agree with this submission. The RBF is to provide for financial comfort and security for the employees upon their retirement. This is similar to any other established pension fund. The fact that the manner in which the benefit is paid out from the Fund to the retiring employee may differ – either in one lump sum or by periodical payments over a period of time – does not alter the character of the Fund from being a pension scheme providing for retirement benefits. Taking this liberal approach in construing the documents relating to the Fund let us now look at some of the relevant provisions in the Trust Deed and Regulations 1976 as to the establishment, purpose and administration of the Fund.

[50] Clause 1 of the Trust Deed 1976 ('the Deed') states that the Fund shall be known as the 'Shell Sarawak and Sabah Retirement Benefit Fund' ('the Fund'). Clause 3 of the Deed makes provision for the constitution of the Fund and this includes contributions made by the Member Companies (as defined in Clause 2(c) of the Deed) pursuant to Clause 5 of the Deed. As to the contributions to the Fund by Member Companies, Clause 5(a) of the Deed provides that the Member Companies shall pay into the Fund such amounts as with the other assets thereof are required to make and keep the Fund actuarially solvent. Under Clause 7 of the Deed the management of the affairs of the Fund is placed with the Trustees. The Trustees' decision on all matters connected with the Fund and its administration is final and binding. Clause 31(1) of the Deed provides that the terms of the Deed and the Regulations do not confer any right on the member of the Fund (ie the employees of the first and second defendants) except against the Fund and the Trustees.

[51] The benefit to which a member of the Fund is entitled under the Fund is spelt out in the Regulations 1976 annexed to the Deed. Regulation 5(1) of the Regulations 1976 provides that when a member of the Fund leaves the service of the first or second defendants on retirement at the age of 55 or because of chronic disability, the member is entitled to be paid a net amount of benefit calculated in accordance with provisions of reg 5. Therefore, it is my view that, from the reading of the two Trust Deeds, the objective and purpose of the Funds is that the RBF was established for the benefit of employees of the first and second defendants employed in Sarawak and Sabah, and accordingly all contributions made to the RBF by employees or by Members Companies to the Funds shall be

utilised towards payment of benefits to the employees upon their retirement.

[52] The benefit is paid in a lump sum; and the lump sum is an aggregate of the amount obtained under paragraphs (a) and (b) of reg 5(2). This is clearly stated in reg 5(2) and this Regulation reads:

> 5. (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:
>
> (a) so much of a Member's balance at the time he leaves Company Service as amounts to contributions made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon in -
>
> (i) the Local Provident Fund, and
>
> (ii) the State Fund, and
>
> (iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and
>
> (b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is included in his Accredited Service
>
> up to the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7.

[53] It is to be noted that the aggregate lump sum under reg 5(2)(a) and (b) is further determined by the qualifying words at the end of reg 5(2). These qualifying words have the effect of determining the limit of the benefit payable to the retiring members. It also explains the use of the expression 'net amount' appearing in reg 5(1). It is these qualifying words or the effect and consequence of them that has become the bone of contention in this case. Before I proceed further let us see the level of benefit a retiring member is entitled to under the Fund.

[54] The formula in determining the level of benefit payable to a member of the Fund is provided under reg 5(3) of Regulations 1976 which reads:

> 5.(3) (a) The level of benefit applicable to a Member who -
>
> (i) has reached age 55, or
>
> (ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or
>
> (iii) has left Company Service because of chronic disability, shall be either the aggregate of

A

2.25 x Relevant Earnings x years of Accredited Service up to 31 December 1990,

2.8 x first M$l,000 of Relevant Earnings x years of Accredited Service from 1 January 1991,

B

2.5 x next M$l,000 of Relevant Earnings x years of Accredited Service from 1 January 1991, and

C

2.2 x balance of Relevant Earnings x years of Accredited Service from 1 January 1991;

OR

2.25 x Relevant Earnings x years of Accredited Service;
whichever level of benefit is the greater.

D

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings.

E

(c) For all other Members, the level of benefit for each year of Accredited Service shall be:

F

(i) 2 x Relevant Earnings where such Member has Accredited Service of at least 20 years but less than 25 years, or is at least 45 years of age;

(ii) 1.75 x Relevant Earnings where such Member has Accredited Service of at least 15 years but less than 20 years, or is at least 40 but less than 45 years of age;

G

(iii) 1.50 x Relevant Earnings where such Member has Accredited Service of at least 5 years but less than 15 years and has not reached 40 years of age.

H

(d) In addition to the benefits applicable under (a), (b) or (c) above, the Trustees shall at the direction of the Employing Company pay specific categories of Members an amount calculated by applying an index to the benefits paid under (a), (b) or (c) above. For the purpose of this Regulation, the index represents the cumulative reduction in the basic remuneration and annual bonus budget for the years determined by the Employing Company.

I

[55] It can be seen that the level of benefit for each retiring member is determined according to a certain formula by taking into consideration factors such as length of service, age of retirement, Relevant Earnings and a multiplying index. The amount arrived at by using the formula is the level of benefit for the purpose of arriving at the aggregate lump sum under reg 5(2) before the authorised deductions under the Regulations. What are these authorised deductions? Regulation 7 provides for the authorised deductions as follows:

7. Authorised Deductions

(1) The Authorised Deductions to be made in calculating the amount of a Member's benefit will be the sum of the following amounts:

(a) Subject to sub-clause (3) hereof the amount of any retiring gratuities paid to the Member by any Company under any retirement gratuity scheme operated by that Company in connection with any termination of service which counts as part of the Member's Accredited Service together with compound interest thereon down to the relevant date;

(b) Subject to sub-clause (3) hereof, any amount which, between the beginning of his Accredited Service and the relevant date, the Member had withdrawn from any retirement benefit fund or scheme or which may have been advanced to the Member out of any retirement benefit fund or scheme or out of any other fund or scheme which is operated by a Member Company for the benefit of employees and which is outstanding at the date on which he ceases to be in Company Service or on which the benefit is to be paid;

(c) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall by law or pursuant to any collective contract or to any award, judgment or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration of benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph, the expression 'collective contract' shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;

(d) If any Member Company certifies in writing to the Trustees that it has found such Member to be guilty of fraud, dishonesty, felony, criminal breach of trust or wilful misconduct by which the Member Company or any associated Company has suffered loss, the Trustees shall deduct from such Member's benefit any financial loss actually suffered by reason thereof by the Member Company or Associated Company and shall pay the amount so deducted to the Member Company or Associated Company.

(2) Interest under paragraphs (a), (b) and (c) of sub-clause (1) hereof shall be calculated at 3% per annum compounded with yearly rests down to the relevant date.

(3) The Employing Company may at its sole discretion, by direction to the Trustees, reduce any of the amounts mentioned in paragraphs (a), (b) and (c) of sub-clause (1) hereof.

(4) For the purpose of this Regulation the relevant date is the date on which the Member ceases to be employed in Company Service.

[56] Reading reg 5(2) and reg 7 together, the formula used in arriving at the net benefit due from the Fund to a retiring member may be stated in equational form as follows:

Net Benefit: A +B = C - D

with

A - being an amount under reg 5(2)(a)

B - being an amount under reg 5(2)(b)

C -being an amount under reg 5(3) and

D - being an amount of Authorised Deductions under reg 7.

[57] Learned counsel for the plaintiffs submitted that the application of the above formula resulted in the diminution or reduction of the benefit due to the plaintiffs. In some cases, it was submitted that some of the plaintiffs, as evident by Exhibits N1 to N6 in Chong's first affidavit, retired with either no benefit at all or worse, in that these plaintiffs technically owed the Fund money (because of the deduction) which ordinarily under a retirement benefit scheme should not have happened. It is the submission of the plaintiffs that the authorised deductions under reg 7, particularly the deduction under paragraph (1)(c) of reg 7, are offensive and contravene the provisions of s 9(1) of the 1951 Act and later s 47(1) of the 1991 Act. It was submitted that under reg 7(1)(c) the Trustees are empowered to deduct on behalf the first and second defendants 'any payment which any company shall by law ... been required to make...by way of additional remuneration ... or in connection with any termination of service…' The plaintiffs contend that under this provision, the Trustees have deducted from the aggregate sum obtained under the formula in reg 5(2) the following sums namely: a) employers' EPF contributions, b) interest/dividends on the contributions, c) employers' PF contributions; and d) interest on the PF contributions. In my view, and as rightly submitted by learned counsel for the plaintiffs, this contention is amply supported by the documentary evidence exhibited in Chong's first affidavit which are the retirement benefit statements issued to the plaintiffs by the defendants. These are exhibits L to N in Chong's first affidavit. A closer examination of these Exhibits shows the deductions included the employers' contributions to the EPF and PF as well as the interest earned on such contributions. It must be noted that the interest that was deducted is the interest paid by the EPF Board on the accredited contributions.

[58] The defendants did not seriously challenge the contention that deductions were made against the aggregate sum obtained under reg 5(2) to arrive at the net amount that is payable to the plaintiffs. The fact that the Trustees were under a duty to make the deduction is self evident in the wording of reg 5(2). The last sentence in that Regulation clearly provides that '[I]n every case the lump sum shall be reduced by the Authorised Deductions mentioned in reg 7'. Shamsuddin, who was also one of the

Trustees, in fact admitted in paragraph 44 of his affidavit dated 17 June 2004, that deductions were made from the gross amount of benefit in order to arrive at a net amount for payment. However, in his written submissions, at p 11, learned counsel for the defendants submitted that there were no deductions and the question of deductions therefore does not arise. He argued that the entitlement under the RBF is merely a top up and that a plain reading of reg 5(2) and 5(3) shows that the net benefit payable to members is not the level of benefits but instead a lump sum sufficient to bring the aggregate of the contributions up to the level of benefits specified in sub-clause (3) of reg 5. In paragraphs 18 and 19 of Lim's affidavit in support of the defendants' encl 30, Lim attempted to demonstrate this top up principle; but in doing so Lim conveniently side-stepped the issue of deduction. I will come back later in this judgment to this issue of 'top-up'. But at this point it suffices for me to say that I am not attracted to the argument advanced by learned counsel for the defendants. In my opinion, there is overwhelming evidence to support the fact the there were deductions made and I have no hesitation in coming to a finding that they were indeed made.

[59] Learned counsel for the plaintiffs submitted that these deductions are unlawful and contravened s 47(1) of the 1991 Act and its precedessor s 9(1) of the 1951 Act. That being the case, it was further submitted that the two offending regulations, namely reg 5(2) and reg 7(1)(c) are ultra vires the aforementioned provisions of the law made by the legislature. It was submitted that the money (ie the contributions and interest earned and any dividend paid) standing to the credit of an employee's EPF (and its predecessor the PF) belongs to the employee. Learned counsel for the plaintiffs cited ss 12(1) and (2) of the 1951 Act and ss 51(1) and (2) of the 1991 Act to support this contention. Learned counsel for the defendants on the other hand submitted that the calculation of members' entitlement under the RBF would only be in breach of the provisions of the PF and EPF if there is a deduction from wages or remuneration of the employee. It was submitted for the defendants that any reading of reg 5(2) and 5(3) of the RBF would conclude that the members entitlement under the RBF is not the level of benefit referred to in reg 5(3)(a) but the lump sum sufficient to bring the contributions up to the level of benefit. Learned counsel for the defendants further submitted that even if the plaintiffs were correct in their argument that there is a 'deduction' in respect of EPF contributions (which the defendants denied), that 'deduction' is not made from the employees' wages or remuneration.

[60] At this juncture it will be appropriate to refer to the relevant provisions of the 1951 Act and 1991 Act as regards wages, remuneration and deductions. Section 2 of the 1951 Act defines 'wages' as follows:

> 'Wages' means the remuneration in money other than a service charge due to an employee under his contract of service or apprenticeship, whether agreed to be paid monthly, weekly, daily or otherwise -
>
> (a) in respect of the normal periods of work to be performed by the employee;

(b) where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee; or

(c) where payment is calculated in relation to the volume of work done, in respect of the work completed by the employee, together with any allowance payable by the employer to the employee in respect, either explicitly or impliedly, of high cost of living.

Provided that the wages of an employee in the service of the Government of Malaysia or of a State or of a statutory or local authority under the new scheme shall be the monthly salary inclusive of pensionable allowances payable in accordance with the salary scales of the new scheme.

And section 9(1) of the 1951 Act reads:

Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages or remuneration of, or otherwise to recover from, the employee the employer's contribution.

[61] It is to be seen that s 2 of the 1951 Act defines 'wages' to mean remuneration in money due to an employee under a contract of service for work done or performed and it includes any allowance payable by the employer in respect of high cost of living. It matters not whether the payment is made on monthly, weekly or daily basis or otherwise. Learned Counsel for the plaintiffs argued that the definition of 'wages' in s 2 of the 1951 Act was all embracing to include ' all remuneration in money other than service charge due to an employee under his contract of service'. Learned counsel then cited two authorities namely the Privy Council case of *Pereira v Hotel Jayapuri* [1986] 2 MLJ 1 and the Supreme Court case of *Consolidated Plantations Bhd v Ethambaram* [1993] 1 MLJ 1 which have ruled that the definition would include all contractual payments due to the employee under his contract of service. Learned counsel for the plaintiff further submitted that the Privy Council in *Jaya Puri* went so far as to hold that it did not matter if the monies due to the employee come from a third party so long as it is due under his contract of service. Then relying on a passage by Brandon J (as he then was) in the case of *The Halcyon Skies* [1976] 1 All ER 856, learned counsel for the plaintiffs submitted that retirement benefits fall under the definition of 'wages' under the 1951 Act. The passage in the judgment of Brandon J (as he then was) which was relied upon by the plaintiffs reads as follows:

This authoritative explanation of the nature of contributions to a pension fund seems to me to justify the view that employer's contributions to such a fund, as well as employee's contributions, can properly be regarded as part of an employee's total wages in the broad sense of the word.

[62] Learned counsel for the plaintiffs submitted, by citing the case of *Parry v Cleaver* [1969] 1 All ER 555, that in law, pensions or retirement benefits are deferred payment of wages. The passage in *Parry* cited by the counsel for the plaintiffs is found in the judgment of Lord Reid at p 560 of the report and it reads:

The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.

[63] In *Parry*, the appellant was a policeman who met with an accident in the course of his duty and as result suffered a disability. He was subsequently discharged from the police force and was awarded a police ill-health award of BP3 18s per week for life. In an action for damages for personal injury against the respondent, the issue was whether the ill-health award was to be taken into account and deductible in computing the damages for the loss of earning capacity. The majority of the House of Lords in that case ruled that it was not deductible. Though in that case no pension fund was involved, the case proceeded as if there was such a fund. In my opinion the principle that can be deduced from this case is that payment from a pension fund is not deductible; likewise if it is a payment from a retirement benefit fund.

[64] This position is also reflected in s 9(1) of the 1951 Act. It is common knowledge that contribution to a Provident Fund is to provide for benefit of an employee on retirement. The section prohibits an employer from recovering the contributions that the employer has made to the fund for the benefit of the employee, by deducting or otherwise the employee's wages or remuneration. What is to be noted in s 9(1) of the 1951 Act is that the expressions 'wages' and 'remuneration' are used together in that section. But the expression 'remuneration' is not defined in the 1951 Act. It would seem that by the definition of 'wages' in s 2 of the 1951 Act, 'wages' would include 'remuneration' but 'remuneration' need not be limited to wages. *The Concise Oxford Dictionary 9th edn 1995* gives the meaning of 'remunerate' as 1) reward; 2) pay for services rendered. Therefore in my opinion, the term 'remuneration' may encompass payment of a retirement benefit under any pension or retirement scheme. This is to be so because the retirement benefit is normally paid to reward an employee for loyalty in services rendered to the employer albeit it is a deferred payment. It is also consistent, in my view, with the law as stated in *Parry* that the retirement benefit or pension is a delayed earned income.

[65] The 1951 Act was repealed by the 1991 Act. The term 'wages' is defined in the corresponding s 2 of the 1991 Act as follows:

> 'Wages' means all remuneration in money, due to an employee under his contract of service or apprenticeship whether agreed to be paid monthly, weekly, daily or otherwise and includes any bonus (commission) or allowance payable by the employer to the employee whether such bonus (commission) or allowance is payable under his contract of service, apprenticeship or otherwise, but does not include -
>
> (a) service charge;
>
> (b) overtime payment;
>
> (c) gratuity;
>
> (d) retirement benefit;
>
> (e) retrenchment, lay-off or termination benefits;
>
> (f) any traveling allowance or the value of any traveling concession; or
>
> (g) any other remuneration or payment as may be exempted by the Minister.

[66] It can be seen that the new definition of 'wages' in the 1991 Act has undergone some changes though substantively it is the same as it was when defined under the 1951 Act. Under the 1991 Act, 'wages' is still described as remuneration in money due to an employee under a contract of service regardless of the manner the payment is made. But it also includes any bonus or allowance payable by an employer to an employee, whether such bonus or allowance is payable under the employee's contract of service, apprenticeship or otherwise. However, the definition excludes certain categories of payment from an employee's wages. In particular, under paragraph (d) of the definition, retirement benefits are excluded. But it was submitted by learned counsel for the plaintiffs that this does not mean that the deductions from the payment of a retirement benefit is not caught by s 47(1) of the 1991 Act which is the corresponding section to the repealed s 9(1) of the 1951 Act. Learned counsel for the defendants however submitted that since retirement benefit payments are specifically excluded from the definition of 'wages', any deduction from the retirement benefit payable to the plaintiffs would not be construed as deduction from wages such as to contravene s 47(1) of the 1991 Act. Section 47(1) of the 1991 Act reads as follows:

> (1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee.

[67] Though the arrangement of the words in s 47(1) of the 1991 Act may be different from s 9(1) of the 1951 Act, in substance the two provisions are in pari materia. That is to say, the two provisions prohibit an employer from recovering the employer's contribution to EPF (or PF) from an employee through the deduction or otherwise of the wages or remuneration of the employee. Again, it is to be noted that, as in s 9(1) of 1951 Act, the terms 'wages' and 'remuneration' are also used together in s 47(1) of the 1991 Act. The 1991 Act also has not defined the term 'remuneration'. However it is a cardinal principle of interpretation of a written law that every word used by the legislature in the statute must be given a meaning. If the word is defined in the statute then its meaning is accepted as defined. But if no definition is given then the meaning to be attributed to such a word is its plain and ordinary meaning within the context of the statute.

[68] Learned counsel for the plaintiffs submitted that the words 'wages or remuneration' in s 9(1) of the 1951 Act and s 47(1) of the 1991 Act would include retirement benefits and therefore any deductions from these benefits to recover the employer's contribution of the employee's EPF is prohibited.

[69] I agree with the view that the word 'remuneration' in the definition of 'wages' in the 1951 Act as well as in s 9(1) and s 47(1) of the Acts respectively, ought to be interpreted liberally and broadly so as not to defeat the purpose and objective of the Acts. Section 17A of the Interpretation Acts 1948 and 1967 provides that '[I]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not)

shall be preferred to a construction that would not promote that purpose or object.' A

[70] There can be no dispute that the purpose and objective of the two Acts is to provide for a retirement benefit Fund to which the employer and the employee are required to contribute in proportion specified by the law. And the employee's contributions are deducted from the employee's remuneration payable under his contract of service whilst the employer's contributions, which is a percentage of the employee's remuneration as specified by law, come from the employer's own fund. Together, the contributions stand to the credit of the employee in the Fund and it belongs to the employee. Therefore the larger the contributions made to the Fund the bigger is the amount standing to the credit of the employee. This will translate into a better financial security for the employee on his or her retirement. It is to enable this objective to be met that the term 'remuneration' should be give a very broad and liberal meaning to include all money due and payable to an employee under a contract of service. B C

[71] There are a number of arguments and authorities that support the view that the term 'remuneration' is wider and broader in meaning than 'wage'. Some of these have been submitted by the learned counsel for the plaintiffs and I just reiterate them here. Firstly, the word 'remuneration' has not been defined in the two Acts. Therefore it has to be given its ordinary meaning and generally it has a generally wide meaning in law. *Stroud's Judicial Dictionary Vol 4* at p 2324 and *Prem's Judicial Dictionary Vol 2* at p 1415 have recognised that ''remuneration' is a wider term than 'salary''. D E

[72] In *The Queen v Postmaster General* [1876] QBD 658 at p 663 Blackburn J said: F

> But I think the word 'remuneration' is a wider term and means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them.

[73] In the *Hotel Jayapuri* case at p 3, Lord Mackay had this to say on the term 'remuneration': G

> it appears to their Lordships that the word 'remuneration' means payment or reward for service rendered by the employee to his employer under his contract of service ...

[74] In that case the appellant was employed as a senior cook by the respondent Hotel Jayapuri Sdn Bhd. The respondent was obliged under the 1951 Act to pay contributions to the EPF not only in respect of the appellant's basic salary and food allowance but also in respect of the appellant's share of the service charges collected from customers. The issue on appeal in that case was whether the service charge was wages that would attract contributions to EPF. The Privy Council ruled it was so. But what is pertinent to note in that case is the remarks by Lord Mackay in the following passage found at p 4 of the report as to whether the service charge can be regarded as remuneration: H I

> [It] is plain that Mr Pereira's (ie the appellant) entitlement to his share of the service charges collected by the hotel company arises under his contract of service with the hotel company and therefore, even if the hotel company in terms of that contract is acting as his agent and the other employees from the hotel's customers the service charges which they pay to the hotel company, that money is due to them by the hotel company under their contracts of service as a reward for the service which the employees render under their contracts of service to the hotel company itself. Accordingly, the share of the service charge is properly to be regarded as due to Mr Pereira under his contract of service as remuneration ... [The words in brackets are mine] [Note: This case is no longer a good law in so far as it relates to 'service charges' being part of 'wages' because the Act was amended soon after this decision to exclude service charges from the definition of 'wages'].

[75] It can be seen from the above passage that any payment due to an employee under the employee's contract of service is to be regarded as remuneration that would attract contributions to the Fund.

[76] Another argument is that the 1951 and 1991 Acts are social legislation by which the Legislature intends to provide for the financial protection and welfare of employees in circumstances where they are no longer able to work either because of old age or other disabilities. Such legislation therefore must be given a liberal interpretation (see *Neoh Choo Ee Sdn Bhd v Vasalmany & Anor* [2004] 4 AMR 357). Given this broad and liberal interpretation, I am of the view that the retirement benefits paid to the plaintiffs from the RBF are remuneration.

[77] In the instant case, and for the purpose of s 9(1) of the 1951 Act and s 47(1) of the 1991 Act, the question that need to be asked, as regards the retirement benefits payable to the plaintiffs, is whether it is remuneration payable under a contract of service between the plaintiffs and the first and second defendants.

[78] The plaintiffs have all along maintained that their entitlement to the retirement benefit payable out of the Fund is under a contract of service with the first and second defendants. Learned counsel for the defendants in his written submission (undated but duly signed by Dato Cecil Abraham, counsel for the defendants) tendered and marked as Court's encl 94, confirms this fact when he said at paragraph 51 of his written submission that 'It is further submitted that the Retirement Benefit Fund constitutes a contract between the first and second defendants and the plaintiffs, and is a term in each Plaintiff's contract of employment.'. However in a supplementary written submission sent to the Court under a covering letter dated 24 August 2004 in the form of Defendants' Note On Plaintiffs' Submission, which in fact was a reply to the plaintiffs' counsel's submissions on the issue of 'remuneration', the defendants seem to take a different and directly opposite stand that is that the retirement benefits do not form part of the terms of the contract of service between the first and second defendants and the plaintiffs. A copy of this Defendant's Note was given to the plaintiffs' counsel who naturally put in a reply in the form of 'Plaintiffs' Response to the Defendants' Note on Plaintiffs' Submission Dated 24 August 2004'. In it, the plaintiffs' counsel, besides replying to the

Defendants' Note, expressed his objection at the manner the defendants' counsel had put in the supplementary submission without prior leave from the court and without seeking the concurrence of the plaintiffs' counsel.

[79] The conduct of, and the manner in which, learned counsel for the defendants put in the supplementary submission without leave of the court and without first notifying the plaintiffs' counsel is not to be condoned. This same issue was taken up by the Federal Court in the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen* [1998] 1MLJ 465. At p 516, the Federal Court made the following remarks:

> Nevertheless, in a situation such as this, as a matter of courtesy, one would expect an attempt to seek the concurrence of counsel on the other side before putting in a supplementation by way of written submission.

[80] In any event I do not think the plaintiffs are unduly prejudiced by the supplementary written submissions by the defendants' counsel since the learned counsel for the plaintiffs had already responded to it by putting in a reply to the submissions.

[81] Now to return to the issue of remuneration and whether the retirement benefits are remuneration payable under a contract of service for the purpose of s 9(1) of the 1951 Act and s 47(1) of the 1991 Act. Learned counsel for the defendants in his supplementary written submissions submitted that the authorities cited by the plaintiffs on remuneration relate only to payment under a contract of service. That is to say the 'remuneration' must be contractual in nature. And it was submitted that since the retirement benefits do not form part of the terms of the contract of service, they cannot amount to 'remuneration' within the ambit of the 1991 Act.

[82] In my view this submission is an after-thought. The defendants cannot blow hot and cold at the same time. In any case I do not think this submission is supported by the defendants own documents. Paragraph 2.01 of the first and second defendants' Manual, at p 74 of the Bundle of Agreed Document B, reads as follows:

> It is the general policy of the Company to establish an overall remuneration package which is competitive with that provided by other comparable employers in Malaysia.
>
> Although it is considered that this can best be done by paying competitive straight salaries, leaving employees the decision as to how to allocate their income between their various needs, the Company endeavours to strike an equitable balance between salaries and additional benefits to arrive a total package that is both attractive and geared to the prevailing circumstances.
>
> Particular attention is paid to employees' requirements relating to housing, medical, retirement, education and other provisions, involving heavier expenses.

[83] It is obvious from the above policy statement as to remuneration for employees working for the first and second defendants, that they are being offered a total remuneration package to include all the things mentioned therein in preference to a payment of straight salaries. I have no doubt that it is this total package that makes it attractive to work for the first and second

defendants. I may also say that the first and second defendants, by offering this total package, are dangling the proverbial carrot to attract prospective employees. Therefore it will be quite natural for the employees of the first and second defendants to have legitimate expectations to get what is being offered. In the *Petronas* case (supra), the Court of Appeal observed at p 357 that 'it is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written agreement itself'. Though in this instant case no written agreement is involved in so far as the Manual is concerned, the observation of the Court of Appeal is equally relevant. It has been agreed between the parties that copies of the Retirement Benefit Fund, Trust Deed dated 6 December 1976 and Regulations and the Provident Fund Trust Deed dated 8 March 1968 and Regulations were given to the plaintiffs at various times during their tenure of service with the first and second defendants. In my view it is safe to conclude that the purpose of giving these documents to the plaintiffs is to make the plaintiffs aware of various benefits offered to them and to let them know in what way they can become entitled to these benefits throughout their service with the first and second defendants. Also in Shamsuddin's first affidavit (encl 68), the defendants had exhibited a document entitled 'Understanding Your Retirement Payment' as Exhibit 'SSA-1'. Page 1 of Exhibit 'SSA-1' opens with the following words: 'What's in store for me at the end of my career with Shell?'. In paragraph 25 of the same affidavit, Shamsuddin deposed that Exhibit 'SSA-1' explains how the RBF works and the application of the formula for its purpose. I have no doubt that this document was also given to employees of the first and second defendants including the plaintiffs. Judging from what is expressed in these documents, it is manifestly clear that, for all intents and purposes, the retirement benefits payable out of the RBF are part and parcel of the contract of service between the plaintiffs and the first and second defendants.

[84] In his supplementary written submissions, learned counsel for the defendants also submitted that even if the term 'remuneration' is wide enough to encompass non-contractual payments such as retirement benefits, the first and second defendants cannot be made liable for the deductions. It was submitted that the trustees of the RBF and the employer (in this case the first and second defendants) are two separate and distinct entities. The trustees, it was submitted, are not the employer of the plaintiffs. It was argued that payment of the benefits from the RBF to the plaintiffs was the responsibility of the trustees, not the employer. If at all the employer is liable, the liability is only limited to making contributions to the Fund. The submission then goes on to say that s 47(1) of the 1991 Act imposes an obligation on the employer; since the payment of the retirement benefits is made by the trustees, it cannot amount to 'remuneration' for the purpose of that section. Therefore, it was submitted s 47(1) of the 1991 Act has no application in this case. To support this line of argument learned counsel for the defendants cited two cases: *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at pp 1407–1408 and *Palmco Holdings Bhd v Commissioner of Labour & Anor* [1986] 1 MLJ 492 at p 494.

[85] I do not think this argument can be sustained. I have mentioned earlier in this judgment that there are arguments which are well supported by authorities to show that the term 'remuneration' is wide enough to encompass retirement benefits. This is particularly so as regards the definiton of 'wages' in the 1951 Act. In addition to the authorities that I have referred to earlier, reference may also be made to the case of *Phillips v The School Board London* [1898] 2 QB 447. In that case, the English Court of Appeal was dealing with s 35 of the Elementary Education Act 1870 which empowers a school board to appoint the necessary officers, including teachers, and it may assign them salaries or remuneration as the board thinks fit. The appellant in that case contributed voluntarily to a superannuation fund set up by the school board. Later the appellant claimed against the school board for the refund of her contributions to the superannuation fund but was rejected by the Court. Vaughan Wiliams LJ, in his judgment, at p 459, said that the school board may make it a condition of service that the officers and teachers, appointed by the board, take their remuneration partly in deferred salary, and that this part of the salary so deferred be devoted to the superannuation fund. Though in this instant case the court is not dealing with the same provision as in *Phillips*, the principle in that case is equally applicable. That is, an employee's remuneration for his services to an employer may be paid either by straight salary or partly in straight and partly in the form of other benefits including retiring benefits. The principle that pensions or retirement benefits are deferred earned income has been accepted in law (see *Parry v Cleaver and The Halcyon Skies* supra)

[86] It is also my view that the passages at pp 1407–1408 in the judgment of Lord Millet in the *Air Jamaica Ltd* case as referred to by learned counsel for the defendants, do not assist the defendants' case. First, the case deals with the application of the rule against perpetuities in relation to a pension fund. Second, those passages do not deal with the issue of interpretation of the word 'remuneration'. Third, a proper reading of those passages show that the learned judge was dealing with the issue whether the plaintiffs in that case had a contractual rights to their pensions which were paid out of a pension scheme created by the company by a trust deed and a pension plan. This can seen from the following passage found at p 1407 of the learned judge's judgment:

> As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions. These are often not inappropriately described as deferred pay. This does not mean, however, that they have contractual rights to their pensions. It means only that, in construing the trust instrument, regard must be had to the nature of an occupational pension and the employment relationship that forms its genesis.

[87] The issue in this instant case is not whether the plaintiffs have any contractual rights to their pensions. The issue in this case is whether the deductions made from the retirement benefits due to the plaintiffs under the RBF are valid and proper deductions in the light of s 9(1) of the 1951 Act

and s 47(1) of the 1991 Act. The *Air Jamaica Ltd* case (supra) is not a case that deals with deductions from a pension or retirement benefit. So that case is of no help to the defendants. It should be noted that in the passage quoted above the learned judge in the *Air Jamaica Ltd* case seems to agree that contributions to a pension scheme set up by the trust instrument formed part of the employee's pay when he said '[T]hey are often not inappropriately described as deferred pay'.

[88] The case of *Palmco Holdings Bhd* (supra) is also not relevant to this instant case. That case did not discuss the issue of remuneration or deduction from remuneration. That case is about a challenge to the validity of regs 8(2) of the Employment (Termination and Lay-Off Benefits) Regulations l980 as being ultra vires the Employment Act 1955 and the determination of who is an employer for the purpose of s 60J(1) of the Act. There is no such issue in this instant case.

[89] What is more pertinent to note is that, on the authorities referred to earlier, retirement benefits may be considered as wages in the form of remuneration in money under a contract of service, albeit a deferred one, for the purpose of the definition of 'wages' under s 2 of the 1951 Act and is thereby caught by s 9(1) of the same Act. This is so because the word 'remuneration' is never defined and retirement benefits are not excluded from the definition of 'wages' under the Act. The definition of 'wages' under the Act is very wide; even after the amendment. It says that remuneration is money, other than a service charge, due to an employee under his contract of service. So what is not excluded is included.

[90] As regards the definition of 'wages' in the 1991 Act, it is obvious that retirement benefits do not form part of wages because that is expressly excluded. But this does mean that retirement benefits as remuneration are not caught by s 47(1) of the Act. I reiterate what I have said earlier in this judgment that in that section the words 'wages' and 'remuneration' appear together. So each must be accorded a meaning. As to 'wages' it has an assigned meaning given to it in the interpretation section. But as to 'remuneration', it is not defined. Therefore it must be given its ordinary meaning. It has been shown that the term has been given a wide meaning to encompass retirement benefits which are also described as a deferred earned income. That being the case it is my view that retirement benefits are also caught by the term 'remuneration' under s 47(1) of the Act.

[91] In paragraph 23 of Chong's first affidavit, he deposed that when the plaintiffs severally received their RBF entitlement from the first and second defendants, it was discovered that deductions had been effected for the first and second defendants' contributions to the EPF and PF for the plaintiffs and the interest accrued on the contributions. Then in paragraph 45 of the same affidavit, Chong deposed that the evidence of the deductions is in the various documents exhibited as Exhibits L1 to L6, M1 to M6 and N1 to N6 in the affidavits. Perusal of these Exhibits shows that each of them contains the following remark:

Less:

Company contribution on……..EPF

Company contribution on……..PF

[92] And wherever relevant, the figures that show the amount deducted would appear against the respective item – EPF or PF or both.

[93] Section 9(1) of the 1951 Act and s 47(1) of the 1991 Act prohibit an employer from recovering the contributions made for the employee by deducting or otherwise from the employee's wages or remuneration. Subsection (2) to both sections makes it an offence for the employer to do so.

[94] Learned counsel for the plaintiffs submitted that the contributions that the first and second defendants made to the EPF or PF for the plaintiffs and the interest accrued on the contributions and credited to the plaintiffs' EPF or PF accounts belong to the plaintiffs. He cited s 50(1) and (2) of the 1991 Act and s 12(1) and (2) of the 1951 Act respectively. Therefore, learned counsel submitted that any deduction is illegal and that any provisions in any agreement or instrument that allows such deduction to be made is ultra vires the provisions of the two Acts. Learned counsel cited the case *Som Prakash Rekhi v Union of India & Anor* [1981] 2 SCR 111 ('*Burmah Shell* case'). That case involved a pension scheme similar to the RBF in this instant case. Regulation 16 of the Regulations that formed part of the pension scheme in that case authorised deduction to be made, at a certain percentage of the amount, from the amount standing to the credit of the member of the pension scheme in the Provident Fund. But s 12 of the Indian Provident Fund Act (which has similar effect as our s 9(1) of the 1951 Act and s 47(1) of the 1991 Act) prohibited any reduction or deduction from such scheme of Fund. Thus the Court in that case was faced with the construction and interpretation of reg 16 of the pension scheme and s 12 of the Indian Provident Fund Act. In expressing its opinion on s 12 and in relation to reg 16 the Court said, at p 151 of the report, as follows:

> We take the view that this benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the beneficial object should be preferred. From that perspective, the inference is reasonable that the total quantum of benefits in the nature of old age pension, gratuity or provident fund, shall not be reduced by reason only of the liability of the employer for payment of contribution to the fund. The section prevails over the Trust Deed.

[95] Learned counsel for the defendants on the other hand submitted, in paragraph 12 of his written submissions, that the RBF is intended to provide the plaintiffs, as its members, with a guaranteed level of payment upon the plaintiffs' retirement. He submitted that the guaranteed level of payment payable to the plaintiffs is derived from several sources and not solely from the RBF. The sources, learned counsel submitted, are the contributions made by the first and second defendants (together with interest thereon) to the EPF, the PF and any other funds which the Trustees may designate and a top up sufficient to bring the aggregate of those

contributions to the level of benefit specified in reg 5(3) of the RBF. Therefore, learned counsel for the defendants submitted that what the plaintiffs are entitled to from the RBF is the top up and from the EPF, the contributions. He argued that together, the top up and the contributions comprise the level of benefit specified in reg 5(3) and it is this level of benefit which is the guaranteed level of payment payable to the plaintiffs on their retirement. But later learned counsel for the defendants seems to contradict himself when he submitted, at paragraph 15 of his written submissions, that 'it is clear from the construction of reg 5(3) and 5(4) of the RBF that the entitlement under the RBF is not equal to the level of benefit set out in sub-clause (3) above but instead a lump sum sufficient to the aggregate of the contribution up to the level of benefit specified in sub-clause (3)'. He cited as an example the entitlement benefits paid to Freda Kedung Sakai, one of the plaintiffs as evident in Exhibit L1 to Chong's first affidavit. He argued that the 'Opening balance' in Freda's statement of account determines the level of benefit which the plaintiff will receive on achieving the age of 55 from EPF and RBF. From there the defendants work out how much they have to pay over and above the Contributions by way or top up to achieve the level of benefit. Hence the entry 'Less Company contribution to EPF'. These are the steps taken to determine the plaintiffs' entitlement under the RBF. It is learned counsel for the defendants' submission that the payment to the plaintiffs is a lump sum payment up to the level of benefit but not the level of benefit itself. Thus it is argued that a reading of the formula in reg 5(2) and (3) does not show any deductions.

[96] I am unable to accept this argument. A plain reading of reg 5(2) clearly shows that the entitlement is a lump sum. This lump sum is an aggregate of the sum in paragraph (a) and (b) of reg 5(2). The determinative factor for the amount of the lump sum is the formula in reg 5(3) for the computation of the level of benefit and entitlement. If for a moment we ignore the amount to be deducted under reg *7*, it would be obvious that the lump sum under reg 5(2) would be equal to the amount computed under reg 5(3). If not for the deduction under reg 7, this lump sum would be payable to the plaintiffs. However if the deductions under reg 7 are taken into account, the lump sum payable is less the amount deducted. It is this deduction that is being challenged, particularly the deductions under reg 7(1)(c). This is one of the reasons that I cannot accept the defendants' submission that the lump sum is a top up to the retirement benefits payable to the plaintiffs by way of EPF contributions. The second reason is that paragraph 12–14 of the defendants' Manual clearly states that the RBF is an additional benefit offered to the plaintiffs as employees of the first and second defendants in addition to any provident fund or retirement benefits scheme set up by the Government for employees. In this case it was the PF and later replaced by the EPF. If it is an additional benefit then it should be above and over what is enjoyed by the plaintiffs by way of EPF contributions to the PF or EPF. It is not disputed that the first and second defendants as employers are obligated under the 1951 Act, and later the 1991 Act, to contribute to PF and later EPF respectively for their employees. The first and second defendants cannot now say that 'though we

have promised the RBF as an additional benefit to the other provident or retirement funds set up by the Government, we cannot give the full benefits because we have contributed to the PF and EPF'. Section 9(1) of the 1951 Act and s 47(1) of the 1991 Act provide that 'Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer contribution from the employee'. These are strong words and there is no ambiguity in these provisions. The expression 'or otherwise recover' in these two provisions is very broad and should be given a broad meaning. If given a broad interpretation, it means that what the employer cannot do directly, he also cannot do indirectly, as in this case. If the first and second defendants are allowed to do what they proposed to do and had done, that is to deduct what they had contributed to the PF or EPF from the employees retirement benefits, it would make the RBF illusory. To echo the words of the learned judge in the *Burmah Shell* case (supra) at p 152, this is what he said:

> The payment of gratuity or provident fund should not occasion any deduction from pension as a 'set off'. Otherwise the solemn statutory provisions ensuring the provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services.

[97] The top up argument is also not acceptable because it goes against the facts of this case. It has been shown by Exhibits L to N in Chong's first affidavit (encl 65) that some of the plaintiffs received zero benefit and some are in a worse position in that they ended up technically owing the RBF money. This fact is not disputed. One may ask then how could a top up pension or retirement benefits scheme end up this way. A 'top up' in its literal sense means to make good the short fall or to supplement what has already been given. If the RBF is really a top up pension or retirement benefit scheme as claimed by the defendants then none of the plaintiffs should end up receiving no benefit at all or even worse, owing the Fund instead. The fact that no demand is made by the Fund or the trustees to the plaintiffs who 'technically 'owed' the Fund money as a result of the deductions made to their lump sum retirement benefits is immaterial.

[98] For the foregoing reasons, the answer to question 1 will be that a member's entitlement under the RBF is an aggregate lump sum under reg 5(2) equivalent to the amount of the level of benefit calculated in accordance with reg 5(3). Accordingly the answer to question 2 will be in the positive.

[99] Now I come to the next set of questions that raised the issue of unjust enrichment. These are questions 3 and 10 to 11. Learned counsel for the plaintiffs submitted that all the three ingredients of the principles of unjust enrichment as found in the passage at p 17 of Goff & Jones *The Law of Restitution* (6th edn) and quoted by the learned counsel at p 23 of his written submissions are satisfied. The first ingredient is that the receipt of the benefit must have enriched the defendant. The second ingredient is that the benefit must have been gained at the plaintiff's expense. The third ingredient is that it would be unjust to allow the defendant to retain that

benefit. The question to ask therefore is what are the benefits that the first and second defendants have received and gained at the expense of the plaintiffs. Once these benefits are identified, the question is whether it is just to allow the first and second defendants to keep the benefits?

[100] Learned counsel for the plaintiffs submitted that firstly the benefits are tax deductions based on tax deductible expenditure from the Inland Revenue from their contributions to the various retirement funds including the RBF the same year that these contributions were made. Secondly the first and second defendants' allowable cost which the first and second defendants claim for their contributions to EPF and RBF for the purposes of Production Sharing Contracts with Petronas. Learned counsel for the plaintiffs submitted that these tax allowances and allowable costs have, in effect, reimbursed the first and second defendants for the cost of making the contributions to the EPF and the RBF. But the plaintiffs were not paid the full retirement benefits at the level of benefits in reg 5(3). Thirdly, the benefits, which the first and second defendants are said to have received and gained at the expense of the plaintiffs are the deductions made to the retirement benefits pursuant to reg 5(2) read together with reg 7.

[101] Learned counsel for the defendants on the other hand submitted that the issue of unjust enrichment does not arise. The defendants, in Shamsuddin's first and second affidavits, stressed that the tax allowances enjoyed by the first and second defendants in respect of the contributions to the Funds are irrelevant. So is the allowable cost obtained pursuant to the Production Sharing Contracts with Petronas. Learned counsel for the defendants also submitted that the issue of unjust enrichment arises only if the plaintiffs are entitled not to the top up but the level of benefit.

[102] As to the last point in learned counsel for the defendants submissions, I have already concluded that the plaintiffs' retirement benefit is a lump sum computed to the level of the benefit. Be that as it may, I am of the view that the tax deductions enjoyed by the first and second defendants under the Revenue law for their contributions to the Funds and the allowable cost under the Production Sharing contract are irrelevant. There is nothing wrong with the first and second defendants enjoying the tax deductions under the relevant laws for their contributions if these are permitted under those laws. Likewise, the first and second defendants may enjoy the allowable cost if this is agreed contractually between Petronas and the first and second defendants. In my view the first and second defendants as business concerns may take advantage of any cost effective measures offered by law including tax deductions and allowable costs. Just because the first and second defendants are enjoying these benefits, the plaintiffs cannot say to the first and second defendants that since these benefits have been received by the first and second defendants, the latter must pass the benefits to the plaintiffs and that the first and second defendants cannot keep it. I do not think that the benefits received by the first and second defendants by reason of operation of law or contractual agreements can be regarded as benefits received at the expense of the plaintiffs. It would be quite different if those benefits were received for or on behalf of the plaintiffs

and the first and second defendants treated them as their own. As to the deductions themselves, it can be seen that under the RBF scheme as set up by the Trust Deed and Regulations 1976, the contributions to RBF are provided in Clause 3 of the Trust Deed and these include contributions made by the first and second defendants. Once these contributions are paid into the Fund, the trustees manage them as specified in Clause 7 of the Trust Deed. The trustees make payment of benefits to the plaintiffs from the Fund. In carrying out this function the trustees have to comply with the Regulations 1976 including making the deductions under reg 7. It is to be noted that the amount deducted from the retirement benefit payable to the plaintiffs is retained in the Fund and not paid out to the first and second defendants. In fact Clause 20 of the Trust Deed provides that even at the closure of the Fund, the amount standing to the credit of the Fund shall be used to pay the benefits of the members of the Fund who are the employees of the first and second defendants. Only after allowances for these payments have been made, and if there is a surplus in the Fund, then and only then the surplus be distributed to the Member Companies on the advice of the Actuary. Thus, the plaintiffs cannot say that the first and second defendants have had the benefit of the deductions at the expense of the plaintiffs. For these reasons the answer to the questions on this issue of unjust enrichment will be in the negative.

[103] The last issue is the issue of breach of trust by the trustees – that is, defendants No 3 to No 9. However action against defendant No 4, 8 and 9 as trustee has been discontinued. This issue is raised in questions No 4 and 12. Learned counsel for the plaintiffs submitted that the breach of trust is in relation to the management of the Fund and in permitting the unlawful deductions to be made from the Fund. He further submitted that the trustees must exercise their powers in the interest of the beneficiaries. He cited the pronouncement by Megary VC in *Cowan v Scarfill* [1984] 2 All ER 750. He also cited the case of *Imperial Group Pension v Imperial Tobacco* [1991] 2 All ER 597 as authority for the proposition that in the event of a conflict between the company who is a contributory to the fund, it is 'the trustees' duty to protect the interest of the beneficiaries. The main complaint against the trustees in relation to the allegation of the breach of trust is that the trustees in this instant case, in making the deduction from the plaintiffs' retirement benefit, had not acted independently or made an independent judgment. It was argued that the trustees had not taken any independent legal advice as to the validity of the computation formula under regs 5(2) and 7(1)(c).

[104] As to this issue, learned counsel for the defendants submitted the same submissions as in relation to the issue of unjust enrichment and contends that there is no breach of trust by the trustees.

[105] Learned counsel for the plaintiffs rightly submitted that 'breach of trust' is not defined anywhere in the statutes. *Ford on Laws of Trust* (1983 edn.) says that it may not be possible to give a definition nor is it beneficial to do so. So the act of breach of trust by a trustee must be seen in the context of the purpose of the trust and the powers given to the trustee in managing

the trust. Seen in this light, does the act of the trustees in this instant case, in making deductions from the plaintiffs retirement benefit as required under reg 7 (which the plaintiffs allege is invalid) and not seeking independent legal advice as to the validity of regs 5(2) and 7(1)(c), amount to a breach of trust?

[106] In *Cowan* (supra), the trustees had a discretion whether or not to approve an investment plan that would likely be beneficial to the trust they administered. They refused to endorse the plan. The Court held that the trustees in that case had not acted in the best interests of the beneficiary. In the *Imperial Group Pension* case (supra), one of the issues was whether Company A, upon it taking over Company B which had set up a pension scheme for its employees, was acting good faith in with-holding its consent to increase the contributions to the fund. In that case the court ruled that Company A may have regard to his own financial interests but only to the extent that it does not breach the obligation of good faith to its employees. Then in *Hillsdown Holdings pic v Pensions Ombudsman & Ors* [1977] 1 All ER 862, the trustees acting under r 21 which gives them power to transfer the assets and liabilities of the FMC pension scheme to another pension scheme, transferred the entire assets and liabilities of the FMC scheme to the HF scheme. The transfer was challenged as an invalid and improper exercise of power. The court ruled in that case that though the trustees acted in the best interests of the beneficiary, the exercise of the power to transfer was invalid and improper because it had as its major consideration the element of payment of the surplus to the parent company of the group that participated in the pension scheme.

[107] None of the above considerations applied to this instant case. The money from the RBF was not transferred to any person or company nor was it taken out of the Fund. The trustees in this instant case were not exercising any discretionary power to effect the deductions from the plaintiffs' retirement benefit. They merely carry out the duty imposed on them by reg 7(1) of the 1976 Regulations in administering the RBF. Though a trustee must always act in the interest of the beneficiary, he also has duty that to observe the terms of the trust. In the instant case, I do not think that just because the trustees made the deductions as authorised by reg 7 without first obtaining independent legal advice as to the validity of reg 7, that this amounted to a breach of trust. For these reasons, the answer to the questions on this issue shall be in the negative.

[108] In the result therefore, the Court will answer the questions referred to it as follows:

1. As to question No l – upon construction of the Regulations of the Shell and Sabah Retirement Fund 1976, the benefit payable to a member is a lump sum equivalent to the level of benefit in reg 5(3)(a).

2. As to questions No 2, 5, 6 and 11 the answer is in the positive. As regards question No 11, though the Court finds that there is no unjust enrichment by the first and second defendants, and that the trustees have not committed any breach of trust, the deductions made are

unlawful and void against ss 9(1) and 47(1) of the 1951 and 1991 Acts respectively. So the amount so deducted should be refunded to the plaintiffs in full.

3. As to questions No 3, 4, 8, 9, 10 and 12, the answer is in the negative.

4. As to question No 7 the Court finds that it not necessary to make any finding. The question framed is too broad and does not deal with the specific provisions of the Trust Deed and the Regulations in which such formula might be used. In fact the formula itself is uncertain.

[109] In the consequence thereof, and as regards the prayers in the plaintiffs' statement of claim, there shall be judgment for the plaintiffs in respect of prayers (1) to (4) in that the declarations prayed for are hereby granted. Also granted are the Orders prayed for in prayers (5) to (8).

[110] Prayers (9), (10) and (11) are refused. The costs of this application is given to the plaintiffs. Costs to be taxed unless agreed.

Ordered that resititution be made to plaintiffs with costs, and an account be taken.

Reported by Lim Lee Na